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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF MONTANA, *et al.*,
Petitioners

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CROW TRIBE, CONFEDERATED SALISH AND KOOTENAI TRIBES, ASSINIBOINE AND SIOUX TRIBES, NORTHERN CHEYENNE TRIBE, AND JAMES BOWEN

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ADDITIONAL STATUTE INVOLVED

The Act of October 10, 1966, 80 Stat. 880, 28 U.S.C. § 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

The petition for certiorari involves seven different cases, all filed in federal court to adjudicate water rights on various river systems in the State of Montana, and consolidated for decision in the District Court.

1. Filing the Federal Court Suits

In January 1975, respondent Northern Cheyenne Tribe filed an action in the District Court pursuant to 28 U.S.C. § 1362 to adjudicate water rights in the Tongue River and Rosebud Creek and their tributaries in Montana. Two months later, the United States filed two suits in the District Court under 28 U.S.C. § 1345. Both suits claimed that the United States was the owner of extensive water rights on its own behalf for national forests, reclamation projects, and other non-Indian uses, and that it held additional rights in trust for the Indians. One complaint covered the Tongue River and Rosebud Creek and their tributaries, which arise on the Crow and then flow through the Northern Cheyenne Reservation. The other concerned all other waters bordering, traversing, or underlying the Crow Reservation. All known claimants to water rights within the affected drainages were named as defendants.[1] Respondent Crow Tribe moved to intervene in both of the Government's suits, and respondent Northern Cheyenne Tribe in the first. All three cases were consolidated by the District Court. Montana and other defendants filed motions to dismiss, which were renewed and argued in July 1976 just after this Court's decision in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) (hereafter "*Colorado River*").

Four additional suits were brought by the United States in the District Court in April 1979 to adjudicate water rights on the streams that border or traverse the

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[1] Respondent Bowen is the non-Indian heir to an Indian allotment located on the Northern Cheyenne Reservation, and claims reserved water rights.

Fort Peck, Blackfeet, Flathead, Rocky Boys, and Fort Belknap Indian Reservations in Montana. As in 1975, the United States claimed extensive water rights for competing, non-Indian uses[2] as well as for the Indian reservations. These complaints also named all known claimants. Respondents Confederated Salish and Kootenai Tribes of the Flathead Reservation moved to intervene, and the Assiniboine and Sioux Tribes of the Fort Peck Reservation have intervened in the suits affecting their respective reservations.

2. Subsequent State Court Proceedings

The Montana Legislature had enacted a Water Use Act in 1973. R.C.M. § 89-865 *et seq.* This Act was amended in 1975 and has since been repealed. See Pet. App. F, pp. 62-101. Proceedings were initiated under this Act only after the first suits were filed in federal court, and never progressed far.[3] In May 1979, one month after the four 1979 suits were filed, Montana enacted an entirely new Water Use Act, M.C.A. § 85-2-101 *et seq.* Under this Act, all claimants to water rights in Montana

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[2] For example, in the Milk River case the United States claims rights to use water for Glacier National Park; for the Milk River Project of the Bureau of Reclamation; for grazing, stock watering, and water holes, and from various nonproducing oil and gas wells on public lands; for five national wildlife refuges and three waterfowl production areas; for two military installations; for customs stations; and to maintain and operate four reservoirs. In addition, in that case it claims rights on behalf of four different Indian tribes from the same source.

[3] Petitioners are mistaken when they say (Pet. 7) that state court proceedings under this Act had been initiated prior to January and March 1975, when the first three of the present suits were filed. In July 1975, Montana filed petitions in the state district courts for Rosebud and Yellowstone Counties requesting those courts to issue orders requiring claimants to water rights to file declarations of their claims. No such order was ever issued in Rosebud County. On August 26, 1975, an order "effective March 1, 1977" was issued by the Yellowstone County court.

must file their claims by a date to be determined by the Montana Supreme Court on petition of the Attorney General. M.C.A. § 85-2-212. In May 1979 the Attorney General filed such a petition, and in June 1979, that court ordered that all claims to water rights arising before July 1973 be filed by January 1, 1982. Pet. App. H, pp. 128-132. The time was subsequently extended to April 30, 1982. *Id.* The Montana Supreme Court rejected a request by the United States for a further delay because of the pendency of these lawsuits, stating that "[t]he pendency of federal litigation does not affect the State of Montana in proceeding to adjudicate non-Indian claims." Pet. App. I, at pp. 144. In fact, no actual adjudications under the statute have been commenced or scheduled: the law provides for suspension of adjudication proceedings during the pendency of settlement negotiations.[4] *See* M.C.A. §§ 85-2-217 (as amended in 1981), 85-2-701 to -703.

3. Federal District Court Proceedings and Congressional Oversight Hearings

In July 1979 the District Court, *sua sponte*, stayed the four 1979 suits. During July and August of 1979, the Senate Select Committee on Indian Affairs, chaired by Senator Melcher of Montana, held oversight hearings on the Montana water rights cases in Washington, D.C. and in three Montana cities. Senate Select Committee on Indian Affairs, 96th Cong., 1st Sess., *Oversight Hearings on Litigation Involving Water Rights in Montana* (1979). At these hearings, witness after witness urged their Senator to procure the immediate dismissal of the federal suits. *E.g.*, *id.*, at 61, 107, 184-85, 196, 241. The Indians' own Congressman testified that they should either surrender their protection under federal law or leave Montana. *Id.*, at 281. Expressions of outrage at the

[4] Five tribes—Crow, Fort Belknap, Fort Peck, Northern Cheyenne and Rocky Boys—are negotiating with the State, so state court proceedings as to those tribes are in suspension.

tribes' effrontery in asserting their rights in federal court were numerous. *E.g.*, *id.*, at 206, 238-39, 502, 575-576. The federal water suits were characterized as "senseless harassment" of Montana's citizens. *Id.*, at 183. In November 1979, Judges Battin and Hatfield (to whom the seven cases had been severally assigned), acting without additional motions, briefing, or argument, issued a joint Memorandum Opinion and Order dismissing the cases based on *Colorado River's* "policy of wise judicial administration." *Northern Cheyenne Tribe* v. *Tongue River Water Users' Association*, 484 F. Supp. 31 (D. Mont. 1979); Pet. App. E, pp. 53-61.

4. Procedings in the Ninth Circuit

The Ninth Circuit, one judge dissenting, reversed. *Northern Cheyenne Tribe* v. *Adsit*, 668 F.2d 1080 (9th Cir. 1982); Pet. App. C, D, pp. 26, 52. The Ninth Circuit based its decision on four alternative grounds. First, that the jurisdictional disclaimers in the Montana Constitution, Article I, prevented Montana courts from adjudicating questions of water rights on Indian lands unless the disclaimer had been properly repealed. 668 F.2d at 1083-1087, Pet. App. 28-38. Second, that under the test laid down in *Colorado River*, there were no exceptional circumstances warranting dismissal in face of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River*, 424 U.S., at 817. 668 F.2d at 1087-1089, Pet. App. 38-43. Third, that in light of the United States' conflicts of interest in seeking to establish claims of its own adverse to those of the Indian tribes it represented, suits against the United States in state court pursuant to the McCarran Amendment, 43 U.S.C. § 666, would not be adequate to protect the rights of the Indian tribes. 668 F.2d at 1089-1090, Pet. App. 43-44. And fourth, that suits by Indian tribes to adjudicate water rights under 28 U.S.C. § 1362 were not rendered subject to dismissal by the McCarran Amendment's consent to state court jurisdiction over water rights suits against the United

States. 668 F.2d at 1090, Pet. App. 44-45. Each of these factors was held to differentiate the Montana water cases from *Colorado River*, and to require that federal jurisdiction be retained.[5]

ARGUMENT

This is simply not a case warranting the exercise of this Court's certiorari jurisdiction. The Court of Appeals held for respondents on four alternative grounds, only two of which are challenged in the petition for certiorari.[6] Assuming for present purposes that the disclaimer issue, which is also before this Court in No. 81-2147, *Arizona* v. *San Carlos Apache Tribe*, would otherwise be worthy of consideration on certiorari, that issue is not properly reviewed on this record because, entirely apart from the disclaimer issue, the Ninth Circuit's judgment rests on three alternative grounds.

Two of those grounds—that the Government's conflicting interests in the waters in question renders a state court suit against the United States inadequate to protect the interests of the respondent tribes, and that by virtue of 28 U.S.C. § 1362, the Indian tribes' suits are not subject to dismissal under the McCarran Amendment[7]—are not even raised in the petition for certiorari.[8]

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[5] The Court of Appeals also directed the District Court to grant the Crow Tribe's motion to intervene. 668 F.2d at 1090, Pet. App. 45-46.

[6] Question 1 in the petition for certiorari raises the disclaimer issue, and Question 3 challenges the Ninth Circuit's holding that the *Colorado River* standards were met. Question 2 appears to present the question of how state disclaimer provisions can be validly repealed. There is no mention of § 1362 or the adequacy of the state forum. Although the Government's Memorandum may seek to raise the § 1362 issue, the Government is not a petitioner but a respondent.

[7] This question was reserved in *Colorado River*. 424 U.S. at 820 n.26.

[8] They are also not mentioned in the briefs *amici* supporting the petition.

The remaining ground (that dismissal was improper under the standards laid down in *Colorado River*) involves merely the application of a known rule of law to the facts at hand. This process, in our view, does not present any issue of general applicability worthy of discretionary review. The United States differs with our position, and supports review of this case because it hopes that this Court will take the opportunity to "clarify" its prior decision in *Colorado River*. But the meaning of *Colorado River* has not extensively troubled the Courts of Appeals, for very few decisions in those courts have even had occasion to consider it.[9] Clarification of *Colorado River* in this Court should follow, not precede, evidence that the Circuits are in confusion or in substantial conflict over the meaning of that case. With deference, we suggest that there is no need for this Court to engage in further explication of *Colorado River* at this time.

Since the judgement below therefore rests on three alternative grounds, there is no reason to reach the disclaimer question in this case. Moreover, respondents respectfully suggest that disposition of this case should not be delayed in the event that the Court should grant certiorari on that question in No. 81-2147. The Ninth Circuit's judgement would not be affected even if the disclaimer issue were resolved in petitioners' favor. This Court sits to review judgements, not opinions; and entirely apart from the disclaimer question, the judgement of the Ninth Circuit rests on independent grounds, two of

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[9] Since *Colorado River* was decided in 1976, the Courts of Appeals have faced only four reported water rights cases involving this question. They are the instant case; its two companions, *Arizona* v. *San Carlos Apache Tribe*, 668 F.2d 1093 (9th Cir. 1982), and *Navajo Nation* v. *United States*, 668 F.2d 1100 (9th Cir. 1982), currently pending as No. 81-2147 in this Court; and *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116 (10th Cir.), cert. denied, 444 U.S. 995 (1979). Of the four decisions, this is the only one that reached the question of compliance with the *Colorado River* standards.

which are not raised in the petition for certiorari [10] and the third of which does not warrant this Court's review.

I. The Ninth Circuit's holding that dismissal was not warranted under *Colorado River* is not a question worthy of review.

No issues of general importance are raised by the Court of Appeals' resolution on this question. There is no dispute that *Colorado River* presents the rule for decision.[11] The only pertinent question—whether on the particular facts of the case, the Court of Appeals applied the standard correctly—is certainly not one of general importance. Indeed, application of the *Colorado River* standards has only rarely arisen in the Courts of Appeals, and without conflicting results.[12]

Nor is the Court of Appeals' resolution of the question causing difficulties with the adjudication of other water rights in the State of Montana. As the Montana Supreme Court stated, "The pendency of federal litigation does not affect the State of Montana in proceeding to adjudicate non-Indian claims." *In re Petition of the United States* (April 27, 1982), Pet. App. I, at 144.

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[10] That two grounds supporting the judgment are not even raised by petitioners makes this case a particularly inappropriate one in which to engage in extensive consideration of the scope of *Colorado River*.

[11] In seeking "clarification" of *Colorado River*, the United States appears in some respects to seek modification of the principles of that case—as it did the only other time the question was raised in this Court, three years ago. See Memorandum for the United States, *Jicarilla Apache Tribe* v. *United States* (No. 79-475), cert. denied, 444 U.S. 995 (1980). But the factors in *Colorado River*, whether or not "clarified" as the Government would have them, support the decision below. The United States does not argue for reversal. "Clarification," if necessary at all, should await a case where the outcome would be affected or where confusion among the Circuits requires resolution.

[12] See note 9 above.

Moreover, the Court of Appeals was correct. Not surprisingly, petitioners devote scant attention to this question in their petition. The District Court reached a contrary conclusion in part because that court's fear of docket congestion, a ground for dismissal clearly improper under *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 344 (1976). See 484 F. Supp. at 36, Pet. App. E, at 61. Petitioners and *amici* supporting them point to no respects in which the Court of Appeals' analysis and application of the *Colorado River* factors were flawed.[13] The Ninth Circuit's conclusion, which fully supports its judgement, does not deserve further review by this Court.

II. Review should be denied because the Ninth Circuit's holding that state court proceedings would not adequately protect the Indian Tribes' interests is correct and unchallenged.

An additional ground upon which the Ninth Circuit's judgement rests is that the Tribes' suits should not be dismissed because the Indians' interests would not be adequately protected by a state court suit against the United States, since the United States' disabling conflicts of interests with regard to the waters involved in this case prevent it from adequately represeting the Indians. See 668 F.2d at 1089-1090, Pet. App. at 43-44, 51-52.

These seven Montana cases involve virtually every federal water right in the entire State of Montana—some owned by the United States in its proprietary capacity and some as trustee for Indian beneficial owners. The case concerning the Milk River (No. 80-3032 in the Court

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[13] The District Court also feared that if jurisdiction over the federal cases were retained, it would be necessary to stay the state proceedings. But in light of the Montana Supreme Court's conclusion that the state proceedings can efficiently proceed notwithstanding the federal actions—a conclusion not available to the District Court when it ordered the federal actions dismissed—this is clearly not so.

of Appeals) provides an excellent example of the conflicts of interest that preclude the United States from adequately representing Indian interests as trustee. First, the United States claims rights to the use of water for Glacier National Park; for the Milk River Project of the Bureau of Reclamation; for grazing, stock watering, water holes, and other uses, and from nonproducing oil and gas wells, on public lands; for five national wildlife refuges and three waterfowl product areas; for two military installations; for customs stations; and to maintain and operate four reservoirs. In addition to all these rights asserted on its own behalf, the Government also claims water rights as trustee for four separate Indian reservations: Rocky Boys, Blackfeet, Fort Belknap, and Fort Peck.

There is simply no way that the United States, with the best will in the world, could provide loyal and undivided representation for all of the Indian interests in light of such conflicts. President Nixon's Message to the Congress on Indian Affairs, 116 Cong. Rec. 23395, 23398 (1970) (emphasis in original) recognized this:

> The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the *private* interests of Indians in land which the government holds as trustee . . .
>
> No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position . . . There is considerable evidence that the Indians are the losers when such situations arise.

If these federal cases are dismissed, the state court proceedings will be wholly inadequate. The Tribes are not parties to these state actions, and cannot be joined involuntarily. 668 F.2d at 1089-1090, Pet. App. 44. Although normally a suit against the United States could

adjudicate the rights of its Indian trust beneficiaries, *Heckman* v. *United States*, 224 U.S. 413 (1912); 25 U.S.C. § 175, this cannot be done here because the United States has an interest in the outcome by virtue of its own proprietary claims to water adverse to the Indian claims and, in addition, the United States would be the sole representative of the conflicting rights of several beneficiaries. 688 F.2d at 1089, Pet. App. 43, 51-52. Neither the law of trusts, *see* Bogert on Trusts § 593 (2d ed. 1960), nor the general law would permit the Indians' rights to be adjudicated in a proceeding where they were represented by such a conflict-ridden trustee. *See Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 305, 316-317 (1950); *Hansberry* v. *Lee*, 311 U.S. 32, 42-45 (1940); *United States* v. *Truckee-Carson Irrigation District*, 649 F.2d 1286 (9th Cir. 1981), 666 F.2d 332 (9th Cir. 1982), petitions for certiorari pending, Nos. 81-2245, 81-2276, and 82-38; *New Mexico* v. *Aamodt*, 537 F.2d 1102, 1106 (10th Cir.), cert. denied, 429 U.S. 1121 (1976). Fundamental rights to due process would be denied the Tribes.

The petition for certiorari does not challenge the Court of Appeals' conclusion that the United States cannot adequately represent the Tribes' interests in state court.[14] The Government's disabling conflicts render any state court proceedings inadequate, and, standing alone, are sufficient to support retention of federal jurisdiction. This question, not presented by prior cases in this Court or any Court of Appeals, does not deserve discretionary review the very first time it arises.

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[14] Although the Ninth Circuit's opinion could be read as considering the inadequacy of the state proceedings as merely one of the factors to be balanced in the *Colorado River* equation, we believe that the opinion is better understood as finding the Government's conflict and the lack of tribal participation in the state court are independent reasons requiring retention of the cases. *See* 668 F.2d at 1089-1090, Pet. App. at 43-44, 51-52. In any event, even if we are wrong in our understanding of the Ninth Circuit's *opinion*, its *judgement* is independently supported by the fact that the Government's conflict would not taint the outcome of the federal suits.

III. Review should be denied because the Ninth Circuit's conclusion that the McCarran Amendment does not apply to actions brought by Indian tribes under 28 U.S.C. § 1362 is correct and unchallenged.

The first of these lawsuits, brought to adjudicate rights to the streams traversing the Northern Cheyenne Reservation, was initiated by respondent Northern Cheyenne Tribe pursuant to 28 U.S.C. § 1362. Section 1362 also provides an independent source of federal jurisdiction for the intervention of the other three respondent tribes in the actions initiated by the United States. See *Fuller* v. *Volk*, 351 F.2d 323, 328-329 (3d Cir. 1965). Resolving an issue specifically left open by *Colorado River*, 424 U.S. at 820 n.26, the Ninth Circuit held that dismissal of suits brought under § 1362 involving the adjudication of Indian water rights in favor of later commenced state court proceedings is improper. 668 F.2d at 1090, Pet. App. 44-45.

This holding, which is sufficient to support the judgment below (and therefore to counsel denying the petition) with regard to the respondent Indian tribes, is not questioned in the petition for certiorari.[15] It is not disputed by the United States. Even if it were challenged, this is not the kind of question that would justify review by this Court in the very first reported case in which it has been decided by a Court of Appeals.[16] And as

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[15] As with the Government's conflict of interest (*see* note 14 above), it is possible to read the Ninth Circuit's opinion as considering that this was merely another factor to be considered under *Colorado River*. *See* 668 F.2d at 1090, Pet. App. 44-45. However, *Colorado River* appears to reserve this as a separate issue (*see* 424 U.S. at 820 n.26) and we believe the Ninth Circuit so treated it. In any event it *is* a separate issue, fully adequate to support the Ninth Circuit's *judgement* with respect to the respondent Tribes, and not worth discretionary review the first time it has ever been addressed by a Court of Appeals.

[16] The question is not discussed in the Tenth Circuit's opinion in *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116 (10th Cir. 1979), cert. denied, 444 U.S. 995 (1979).

discussed below, it was decided correctly by the Court of Appeals.

Section 1362 was enacted in 1966. It provides for federal jurisdiction over civil actions brought by Indian tribes and arising under the Constitution, laws or treaties of the United States, without regard to the amount in controversy.[17] The legislative history of § 1362 demonstrates that it was prompted by *Yoder* v. *Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 339 F.2d 360 (9th Cir. 1964), which held that Indian tribes could not bring property litigation in the federal courts without satisfying the $10,000 amount in controversy requirement.[18] *See* H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S. Code, Cong. & Admin. News 3145, 3146-3147. Significantly, Congress by enacting § 1362 decided to allow all cases brought by tribes presenting issue of federal law to be heard in federal court.

Congress passed Section 1362 for four reasons. First, because "traditionally, the matters concerning Indian lands under trust allotments fall within the exclusive control of the Federal Government. The judicial determination of controversies concerning such lands commonly is committed to the Federal courts, *Minnesota* v. *United States*, 305 U.S. 382 (1939)."[19] H.R. Rep. No. 2040 at 2, 1966 U.S.C.C.&A.N. at 3146. Second, "particularly as to this class of cases [arising under federal law] it is

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[17] Section 1362 is quoted in full at p. 1 above.

[18] The $10,000 in controversy requirement was not removed generally for federal question jurisdiction until 1980. P.L. 96-486, § 2(a), 94 Stat. 2369, codified as 28 U.S.C. § 1331.

[19] In *Minnesota* v. *United States*, 305 U.S. 382 (1939), Mr. Justice Brandeis wrote for a unanimous Court holding that state courts had no jurisdiction of a lawsuit to condemn Indian allotted lands even though, by Act of Congress, state substantive law would be applied and such a suit could properly be brought in federal court.

appropriate that the actions be brought in the U.S. District Court." *Id.*; *see also* S. Rep. No. 1507, 89th Cong., 2d Sess. 3 (1966). Third, "There is great hesitancy on the part of the tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated." S. Rep. No. 1507, *supra*. Finally, "Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years." *Id.*

Section 1362 evinces clear congressional policy that federal courts are the proper forum for deciding suits brought by Indian tribes to protect their property rights arising under federal law. Congress specifically determined that a federal court should be available to decide such cases, recognizing too that Indian tribes, often with good reason, have long feared the exercise of state authority over them.

The Ninth Circuit's construction of Section 1362 is fully consistent with the purposes and policies of the McCarran Amendment—although were there any conflict between the two, § 1362, which is both later in time and, since it deals only with Indian tribes, is the more specific statute, would control. *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). The McCarran Amendment waives the immunity from suit of the United States as a defendant in federal and state court adjudications of water rights. It thus ensures that comprehensive water rights adjudications can be had and permits the United States to be sued as trustee for Indian water rights in appropriate circumstances; but it does not mention Indian tribes and clearly does *not* waive their immunity from suit. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). By contrast, § 1362 ensures tribes a federal forum where Indian tribes commence suits as plaintiffs to protect their federal rights (be they rights to water or otherwise). The McCarran Amendment's waiver of the Government's

immunity is irrelevant to actions brought by another party (in these cases Indian tribes), which was not a focus of Congress's consideration when the McCarran Amendment was enacted.

The Ninth Circuit's decision allows both statutory schemes to operate. Where no suit is pending in federal court in which a tribe is plaintiff, a state may sue the United States as a defendant under the McCarran Amendment, and normally may include Indian rights for which the United States is a trustee. On the other hand, once a Tribe has invoked the policy of § 1362 by bringing or intervening in a federal court action, a State surely cannot "prevent Indians from fully litigating their rights to water in federal court" simply by subsequently enacting a water adjudication statute and joining the United States in a duplicative state court action. Compare 668 F.2d at 1090, Pet. App. C, at 45.

Since Section 1362 affords an independent basis for the Ninth Circuit's judgment, the issue was not raised in the petition for certiorari, and the Ninth Circuit's determination does not conflict with any other lower court decision, the petition should be denied.

CONCLUSION

Certiorari should be denied in this case and the long-delayed adjudication of Indian water rights allowed to proceed in federal court. The Ninth Circuit's decision vindicates a long-standing policy favoring federal over state courts as the forum to adjudicate federal-law claims to property asserted by Indian tribes. Indian tribes that have first brought federal court actions to protect their precious reserved water rights—"without which their lands would have been useless," *Winters* v. *United States*, 207 U.S. 564, 576 (1908); accord, *Arizona* v. *California*, 373 U.S. 546, 600 (1963)—should not be displaced into state court.

This Court needs no lengthy reminder of the frequency with which it has in recent years been required to review and reverse decisions of state courts on Indian law questions. Since 1960, this Court has considered 23 such state decisions. It has reversed or vacated 19 of these decisions, 12 unanimously.[20] This Court's decisions

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[20] The decisions reversed were:

Ramah Navajo School Board, Inc. v. *New Mexico Bureau of Revenue*, —— U.S. ——, 50 U.S.L.W. 5101 (July 2, 1982) (6-3) (New Mexico);

White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980) (6-3) (Arizona);

Central Machinery Co. v. *Arizona State Tax Comm'n.*, 448 U.S. 160 (1980) (5-4) (Arizona);

United States v. *John*, 437 U.S. 634 (1978) (9-0) (Mississippi);

Bryan v. *Itasca County*, 426 U.S. 373 (1976) (9-0) (Minnesota);

Fisher v. *District Court*, 424 U.S. 382 (1976) (9-0) (Montana);

Antoine v. *Washington*, 420 U.S. 194 (1975) (7-2) (Washington);

Washington Game Dept. v. *Puyallup Tribe*, 414 U.S. 44 (1973) (9-0) (Washington);

Mattz v. *Arnett*, 412 U.S. 481 (1973) (9-0) (California);

McClanahan v. *Arizona Tax Comm.*, 411 U.S. 164 (1973) (9-0) (Arizona);

Kennerly v. *District Court*, 400 U.S. 423 (1971) (7-2) (Montana);

Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 (1968) (8-0) (Oklahoma);

Warren Trading Post v. *Arizona Tax Comm.*, 380 U.S. 685 (1965) (9-0) (Arizona);

Seymour v. *Superintendent*, 368 U.S. 351 (1962) (9-0) (Washington).

The decisions vacated were:

Washington v. *Washington State Commercial Passenger Fishing Ass'n.*, 443 U.S. 658 (1979) (6-3) (Washington);

[Footnote continued on page 17]

since *Colorado River* have expressly alluded to the hostile treatment sometimes accorded Indians in state courts. *See, e.g., Ramah Navajo School Board* v. *New Mexico Bureau of Revenue*, —— U.S. ——, 50 U.S.L.W. 5101, 5105 (July 2, 1982) (expressing "disappointment that the [state] courts below apparently gave short shrift to this principle [of construing Indian statutes and regulations generously to comport with traditional notions of tribal sovereignty] and to our precedents in this area . . . ."); *Washington* v. *Fishing Vessel Ass'n.*, 443 U.S. 658, 696 n. 36 (1979) ("Except for some desegregation cases, the [federal] district court has faced the most concerted official and private efforts [by, among others, Washington's state courts] to frustrate a decree of a federal court [establishing Indian fishing rights] witnessed in this century."); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 673-674 (1979) ("Adequate means are . . . available to insure fair treatment of tribal and federal interests [because] the legal issues are Federal and the federal courts will have jurisdiction to hear them."

Although this Court in the past has been generous with its time, plenary review here of the myriad ques-

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[20] [Continued]

Puyallup Tribe v. *Department of Game*, 433 U.S. 165 (1977) (7-2) (Washington);

Satiacum v. *Washington*, 414 U.S. 1 (1973) (9-0) (Washington);

Tonasket v. *Washington*, 411 U.S. 451 (1973) (9-0) (Washington);

Metlakatla Indian Comm. v. *Egan*, 369 U.S. 45 (1962) (9-0) (Alaska).

By contrast, this court affirmed only three state court decisions—*DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) (6-3) (South Dakota); *Puyallup Tribe* v. *Dept. of Game*, 391 U.S. 392 (1968) (9-0) (Washington); *Village of Kake* v. *Egan*, 369 U.S. 60 (1962) (9-0) (Alaska);—and partially reversed and partially affirmed the state court decision in one case—*Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973) (6-3) (New Mexico).

tions of law and of fact involved in Indian water rights litigation is simply not feasible.[21] Many of these questions are not of general importance. When the United States is forced to sue or be sued in state courts, at worst its vital interests can be protected by remedial legislation in Congress. Not so for small and powerless Indian tribes. For them a federal district court—with review of right by a federal court of appeals—may be the last forum practically available.

The congressional hearings on this litigation, described at pp. 4-5 above, give ample evidence that water and Indians are as highly charged in Montana as the fishing rights in *Washington* v. *Fishing Vessell Ass'n., supra.* Thus, these cases are paradigms of the kinds of "national causes" [22] for which the Framers of our Constitution established an independent federal judiciary whose judges enjoy constitutional guarantees of life tenure and fixed and irreducible compensation for their services. *See Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, —— U.S. ——, 50 U.S.L.W. 4892, 4894-95 (June 28, 1982). Montana's elected judges, in Hamilton's words, "will be too little independent to be relied upon for an inflexible execution of the national laws." *The Federalist No. 81* (Hamilton) 547 (J. Cooke ed. (1962).[23]

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[21] For an example of the kind of issues that must be resolved to determine the extent of Indian water rights, *see, e.g.*, the February 22, 1982 Report of the Special Master in *Arizona* v. *California*, currently pending as No. 8, Original, in this Court.

[22] *The Federalist No. 81* (Hamilton) 547 (J. Cooke ed. 1962).

[23] Hamilton's words were echoed almost two centuries later by the National Water Commission. That Commission recommended generally that federal water rights claims be tried in state courts. With regard to Indian claims, however, "[b]ecause of potential conflict between Indian and non-Indian water users and to avoid the suspicion of bias that might attend adjudication by elected State officials," the Commission recommended adjudication in federal courts. National Water Commission, Water Policies for the Future: Final Report to the President and to the Congress of the United States 479 (1973).

The petition for certiorari should be denied.

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